Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

Carmen Caballero Rivera, Talí Benet Soto
Petitioners

v.

The Chase Manhattan Bank; Housing Investment
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First District

PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

Introductory statement

The present case was dismissed at the District Court under Rule 9(b) of Federal Civil Procedure. Petitioners filed again their case at the state level, whereby Respondents removed the case to the District Court. The District Court instead of following the state law exemption doctrine on res judicata or collateral stoppel cases in diversity of citizenship, applied the federal law under Rule 9(b) of Federal Civil Procedure and dismissed the case. Thereafter, the First Circuit Court affirmed the judgment entered by the District Court that is contrary to the jurisprudence established by the Puerto Rico Supreme Court. According to the Supreme Court of Puerto Rico, Res Judicata and Collateral stoppel will not stand when there is a state cause of action and there has been no plenary trial at the federal level and the judgment affects public interest or the nucleus of the family negatively. In this case, a building can collapse with more than three hundred families and more than 1000 people with their homestead in Puerto Rico.

I. Whether the First Circuit Court failed to apply state law principles developed by the Puerto Rico Supreme Court over res judicata and collateral stoppel when this case deals with diversity of citizenship and principles of public interest and the family nucleus that is affected negatively as their homestead is in a building that can collapse with more than three hundred families and more than one thousand people living therein.

PARTIES TO THE PROCEEDING

Petitioners Carmen Caballero Rivera and Talí Benet Soto are owners of the building in question. Housing Investment Corp. is a subsidiary of The Chase Manhattan Bank. Although there are more than two hundred contracts made with the owners of the Condominium Segovia. In order to reopen the case and in order to avoid more unnecessary work this action was filed at the state court as a class action.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Carmen Caballero Rivera and Talí Benet Soto (Petitioners) by undersigned counsel, under appropriate rules of this Court, respectfully request that this Court issues a writ of Certiorari to the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The Order and Judgment of the United District of Puerto Rico, case number 00-1858 CCC and the Opinion and Judgment entered by the First Circuit Court, case number 01-1985, Judgment entered by the District Court under Hon. Judge José Fusté, case number 99-1375; are unreported.

JURISDICTION

Statutory basis for Jurisdiction: The district court obtained its jurisdiction based on 28 USC. Sec. 1441 and 1446, diversity of citizenship. The First Circuit Court had jurisdiction under the provision of 28 USC. Sec. 1291. Petitioners invoke this Court's jurisdiction under 28 USC

1254(1). The First Circuit issued the companion opinion of the case on January 10, 2002.

STATUTORY PROVISIONS INVOLVED

This appeal is based under the exemption doctrine developed by the Supreme Court of Puerto Rico that states that no res judicata or collateral stoppel will stand when there are concerns of public interest or when the family nucleus is affected negatively by a court's decision.

Under Puerto Rico or state law, there is an enormous amount of public interest in the safety of what it is constructed, according to. Géigel v. Mariani 85 P.R.R. 43, 47 (1962) and González v. Agostini, 79 P.R.R. 481 (1956). Also when there is a situation that affects negatively the family nucleus, res judicata and collateral stoppel will not stand, according to Francisco Ramos Gonzalez v. Francisca Félix Medina, 121 P.R.R. 302 (1988) 1988 PR Sup. LEXIS 190.

Section 1 of the 14th Amendment of the U.S. Constitution provides:

All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside, No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 9(b) of the Federal Rules of Civil Procedure provides:

Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Rule 41(b) provides:

Involuntary dismissal: Effect Thereof: For failure of

the plaintiff to prosecute or to comply with these rules or any order if the court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

This action was originally filed with the District Court for Puerto Rico. It was dismissed on March 30, 2000, by the District Court under Hon Judge José Fusté, under Rule 9(b) of Federal Civil Procedure. The case was filed under diversity of citizenship. The Petitioners were trying to lift the judgment entered in 1986 for fraud upon the court by Respondents. Petitioners did not appeal their case before the First Circuit Court because the public interest involved and because the homestead of more than three hundred families are affected. See Judgement on Appendix, page 9A.

Petitioners filed their complaint at the state court, following the exemption for res judicata and collateral stoppel principles under state law developed by the Supreme Court of the Commonwealth of Puerto Rico for diversity of citizenship cases and public interest.

Thereafter, Respondents removed the case to the District Court for Puerto Rico and it was dismissed under principles of res judicata and collateral stoppel following federal law, under Hon. Judge Carmen Consuelo de Cerezo. The First Circuit Court affirmed the decision,. See Judgement Appendix page 1A. Both federal courts did not follow or applied state law. Petitioners must point out that the judgment entered by Hon. Judge José Fusté recognized that the issue of fraud exemption applied in this case and was not bar by res judicata or collateral stoppel. Also made a fact-finding as to that the allegations made in the complaint, if true, constitute a fraud upon the court under state law. Hon. Judge José Fusté also made a finding that Respondents made all the irregular payments to the engineer that left the building in ruins and without following the plans approved by the Commonwealth of Puerto Rico. See Appendix pages

18A and 17A.

The structural study was obtained at the time that this case was under the consideration of Hon. Judge José Fusté. By these fact-findings are clear that Hon. José Fusté anticipated the possibility that the case could be filed with the state court. In other words the court accepted that the complaint as it was alleged complied with the pleadings for fraud upon the court according to state law which does not follow Rule 9(b) of Federal Civil Procedure.

This is a Certiorari from Hon. Judge Carmen Consuelo de Cerezo's judgment and not from Hon. Judge José Fusté's judgment as it mistakenly appears from the First Circuit's decision.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Under Rule 10, Rules of the Supreme Court of United States, the Honorable Supreme Court will grant a review on writ of Certiorari when a United States Court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with the state court of last resort; or has so far departed from accepted and usual course of juridical proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

In the present case both, the First Circuit and the District Court did not follow state law for res judicata and collateral stoppel set up by the Commonwealth of Puerto Rico Supreme Court's decisions. The deference for such

decisions have been acknowledged by the First Circuit Court previously when there is consideration of public interest and those situations that affect the family nucleus negatively. Petitioners have been deprived of the due process of law. Therefore, the treatment to the Petitioners on this case have been totally different from previous cases and contrary to the Supreme Court of Puerto Rico decisions. This Certiorari is the last resort that these members of the family and owners have before the federal court; members of a community that maintain their homestead in this building.

Argument:

> I. Whether the First Circuit Court failed to apply state law principles developed by the Puerto Rico Supreme Court over res judicata and collateral stoppel when this case deals with diversity of citizenship and principles of public interest and the family nucleus that is affected negatively as their homestead is in a building that can collapse with more than three hundred families and more than one thousand people living therein.

Petitioners Carmen Caballero et al., contend that res judicata and collateral stoppel do not apply when no trial had been celebrated at the federal jurisdiction and there is a public interest involve or when the family nucleus is affected negatively, according to state law. Had the District and First Circuit Court read the complaint filed with the state court, it had to conclude that Respondents Chase Manhattan Bank and Housing Investment committed a fraud upon the court. In addition, it is stated how this scheme was developed against the state court and state agencies. This complaint

filed at the state court also complies with Rule 9(b) of Federal Civil Procedure. See Appendix page 20A. as required by Hon. Judge José Fusté, describing the scheme.

Neither the District Court nor the First Circuit Court addressed the issue of public interest brought by Petitioners or whether the family nucleus is affected negatively. Had both federal courts followed state law the decision would be different.

State law had to be followed in the case at bar by both the District Court and the First Circuit Court. See Erie v. Tompkins, 304 U.S. 64 (1938),,where the Supreme Court decided that diversity citizen cases must follow state law. In Géigel v. Mariani op.cit, the Supreme Court of Puerto Rico stated categorically that there is **an enormous amount of public interest in the safety of what it is constructed**. See the statement on page 47 of the case. See also González v. Agostini, op. cit. The U.S. Supreme Court already determined that federal res judicata principles only apply on non diversity cases. See Heiser v. Woodruff. 327 U.S. 736 (1946).

The District Court based its decision on the prior dismissal following Rule 9(b) of Federal Civil Procedure under Hon. Judge José Fusté. In this case, the state law for Res Judicata should have been followed when there is a situation of security on the construction that also places the family nucleus in jeopardy.

The Petitioners filed the enclosed translated copy of the Complaint at the state court and made the following relevant allegations concerning the fraud upon the court by Respondents: See Appendix page 21A.

> "7. The defendants, as it comes forth from some minutes dated January 14, 1975, represented by Messrs. Dionisio Ramirez and Man uel Jimenez, proceeded to make certain

agreements for engineer Agapito Font to proceed with the alignment of the building known as Condominio Segovia, without following the blue prints originally approved for the construction of the same by the concerned agency, and leaving the building in ruins.

8. That while these interventions were being made by said engineer Agapito Font, some related reports were distributed wherein he informed the agreed upon illegal interventions in order for him to be paid for his services by the defendants.

9. That prior to the reports made by engineer Agapito Font, he would go by the offices of Housing Investment Corp., and Housing Investment Corp., subsidiary of Chase Manhattan Bank, would pay for his fees with corporate checks.

10. That with the purpose of making all those illegal repairs, the defendants put in an escrow account the amount of $655,000.00 from which payments were made for the alleged repairs, knowing that the same were illegal and would endanger the security of the people in the building.

11. Engineer Agapito Font appeared for a deposition and under oath declared that the reports were certifications, that he had fixed the building, and that the same was in perfect condition.

12. Later on, the defendants, during the month of November 1994, used that evidence in a motion under oath for summary judgment, to obtain the dismissal of case

79-7994, supra, before the Superior Court of Puerto Rico.

13. That among other things, engineer Agapito Font cut an unnumbered amount of iron rods from the transversal weight columns "shear walls", and substituted them with steel plates.

14. That Agapito Font stated in a deposition under oath having repaired and certified the Condominio (Condominium) Segovia, presenting the referred reports or briefs, knowing that the building's concrete walls do not comply with the demands of the Building Code.

15. That this technique utilized causes a column defect, that when force is made with the concrete, the same breaks and the building may collapse.

16. That the shear walls provide ductility for the building in cases of hurricanes or earthquakes. Therefore, the building lacks capacity to withstand earthquakes or hurricanes.

17. That in a Motion for Summary Judgment the attorneys for the defendants appeared and used the reports or briefs of engineer Agapito Font, under oath, and before the consideration of the Superior Court, in case 79-7994, and obtained the dismissal of the pending litigation through summary judgment on January 31, 1986, knowing that the reports were created in an illegal manner and that perjury was being committed.

18. That the judgment of the Superior Court dated January 31, 1986, determined that

> the said construction deficiencies were repaired and certified by engineer Agapito Font, this based on the reports, briefs or certifications of the repairs presented by the defendants before the court in order to perpetuate the fraud by the attorneys of the defendants.
>
> 19. That litigation 79-7994, supra, had been presented in order to find a remedy to the hidden defects affecting said building, among these, the cutting of the iron rods in the columns "shear walls", for which it was therefore dismissed because of the defendant's fraudulent acts, by not being able to evidence the defects".

The First Circuit Court also did not pay attention to the decision made by the Supreme Court of Puerto Rico in Francisco Ramos Gonzalez v. Francisca Félix Medina, 121 P.R.R. 302 (1988), 1988 PR Sup. LEXIS 190, a diversity of citizenship case and dismissed by Hon. Judge Carmen Consuelo de Cerezo at the district court level. Included on the Appendix page 5A. The Supreme Court of Puerto Rico decided that the family nucleus and how it is affected negatively goes beyond and above the defense of res judicata and collateral stoppel. The Supreme Court resorted to Civil law because the civil law on res judicata requires looking into problems of family representation. Because of the family nucleus was affected negatively and because it was a state action, the Puerto Rico Supreme Court allowed the Plaintiffs appellants to continue with their cause of action at the state court, notwithstanding the fact that the case had been dismissed by the District Court. The Supreme Court of Puerto Rico stated that it will no followed dismissal by technicalities when the family nucleus is in jeopardy as there is public interest also in

those situations. The married couple had been the object of an aggression by state police. In this case as it seems clear the family nucleus can end up loosing their lives or their homestead or both. It is clear that Family Law has been traditionally permeated with an intensely compelling state interest. In addition, the parties under this type of specific situation are not to be penalized for, as in this case, not amending the complaint with the federal court. See Francisco Ramos Gonzalez v. Francisca Félix Medina, op. cit.; 18 Wright, Miller & Cooper, Federal Practice and Procedure-Jurisdiction and Related Matters (Res Judicata) sec.4459, at 523. St. Paul Minn., West (1981). Both family law and property law have been recognized as matters of peculiarly local concern and therefore governed by state and not federal law. In re Burrus, 136 U.S. 586, 593-594 (1890); United States v. Yazell, 382 U.S. 341, 349, 353 (1966) A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden. United States v. Yazell, 382 U.S. 341, 352 (1966).

The Puerto Rico Supreme Court has consistently maintained that, as a matter of public policy, the doctrine of res judicata should not be applied if it would defeat the ends of justice. See also Figueroa v. Municipality of San Juan, 98 P.R.R. 523, 545 (1970); Feliciano Ruiz v. Alfonso Development Corp., 96 P.R.R. 105, 111 (1968); Perez v. Bauza, 83 P.R.R. 213, 218-20 (1961); Gonzalez v. Fireman's Fund Insurance Co., 385 F. Supp. 140, 146 (D.P.R.1974). See also Rodriguez v. Baldrich 628 F.2d 691 (1st Cir. 1980) a case dismissed with prejudice at the state court of Puerto Rico and the First Circuit Court determined that under diversity of citizenship the Court will look into the res Judicata doctrine under Puerto Rico law. The First Circuit

Court said that: "The courts of Puerto Rico have recognized that in certain cases, the policies of res judicata are not well served by literal application of the procedural rules of the courts." Thereby citing Berrios Rivera v. British Ropes, Ltd., 575 F.2d 966, 970 (1st Cir. 1978). This case was remanded to the District Court for reviewing the status of Puerto Rican law concerning res judicata and its application to these facts. The District Court finally decided that the case did not involve situations or facts where the family nucleus should had been protected.

This Honorable Court should consider that in this case there are more than three hundred families with their homestead and lives at stake. In Puerto Rico, the homestead is a right for the family under 31 LPRA. Sec. 1851, which is exempted from attachment 31 LPRA Sec. 1852.

As a legal principle, the defense of res judicata, in general terms, is based on considerations of public policy and necessity: On the one hand, the interest of the State in terminating litigation in order that judicial issues may not be perpetuated. Respondents left a building in ruins and with the possibility of collapsing and committed a fraud upon the First Instance, Superior Court of Puerto Rico, as Hon. Judge José Fuste's opinion acknowledged. Probably anticipating the public interest involved in the case.

The building in question can collapse, and the District Court took judicial notice of this fact on its judgments. The complete structural study was sent to the same attorney for Respondents and to Hon. Judge José Fusté.

Had the District Court read the subsequent complaint filed with the state court and Judge Fusté judgment, it would have read all the facts concerning the fraud committed by Agapito Font in a scheme with Respondents. There was a fraud not only upon the court but also to the state agencies. Respondents obtained the use permits fraudulently from the state agencies at the end of the construction, certifying its

compliance with the original plans, in order to have it sold and recuperating its monies. In The Matter Of: Constructora Maza, Inc., v. Housing Investment Corp., 93 B.R. 838; 1988 U.S. Dist. LEXIS 13808, the Federal District Court determined that the defendant disbursed monies on their personal capacity to several subcontractors directly with its personal money and out of the credit line approved for the construction loan. Housing Investment was trying to get back a sum around some eighty four thousand dollars ($84,000.00) dollars. Hon. Judge José Fuste made that determination in that judgment. Respondents disbursed from another account the amount of more than six hundred and fifty thousand dollars ($650,000.00), among others, to Agapito Font, in order to cover structural defects and make illegal repairs, leaving the structure in ruins.

It seems clear from the facts of this case that not only a dismissal under Rule 9(b) and 41(b) of Federal Civil Procedure is not a bar to the state cause of action when this case is embellished with public interest. Public interest that has consistently maintained by the Supreme Court of Puerto Rico and will not succumb to the defense of res judicata and collateral stoppel, even when the parties do not appeal or do not take any subsequent action.

It is clear that it would be a futile exercise of resources had no allegations or evidence against the Respondents existed. If the District Court would had read the pertinent parts in the complaint filed in the state court it would have discovered all material fraudulent alleged facts against Respondents. Examination, that had to follow local rule for fraudulent acts within state law. In this case, a fraud upon the court and all frauds concocted by Respondents.

On its opinion and order on page 11 the District Court under Hon. Judge José Fuste stated:

Our inquiry, then, is whether the fraud

> exception applies in this case. "We find that it does. *Plaintiffs allege* a previously unlitigated claim of fraud, that engineer Agapito Font conspired with Defendants to present a false document and testimony to the state court, that if true, would erode the foundation of the state court judgment at issue according to the state law".

At pages 1-3 of its judgment the court stated:

> "The Plaintiffs, Carmen Caballero Rivera and Tall Benet Soto, bring this diversity action for relief of judgment against Defendants, the Chase Manhattan Bank, N.A. and its subsidiary Housing Investment Corporation, alleging that Defendants committed fraud in prior state court proceedings concerning the certification and legality of alterations and repairs done on a condominium, "Condominio Segovia" located in Hato Rey, Puerto Rico. Plaintiffs move for partial Summary judgment. They contend that the condominium is in such poor condition that it may collapse at any moment and that, as a result, it could not have met the local building and construction standards which Defendants alleged in the state court proceedings. Defendants oppose Plaintiffs, motion and cross-move for summary judgment".

On its Factual Background, the district court stated that:

> "Plaintiffs, a group of homeowners who purchased apartments at the condominium

and the Board of the condominium, filed suit in the Puerto Rico Superior Court, No. 79-994 (806), against Defendants. They alleged nonconformance with local building standards and regulations throughout the renovation and repairs to the building that Defendants financed. The state court granted Defendants' unopposed summary judgment motion. Plaintiffs allege that Defendants, in submitting their motion for summary judgment, committed a fraud in the state court proceedings by presenting fraudulent documents which attested that the condominium was repaired and certified according to state construction laws. Specifically, Plaintiffs maintain that engineer Agapito Font openly conspired with Defendants by appearing at a deposition and averring falsely that the alterations and repairs made by Defendants did not negatively impact the structure of the building and met all applicable construction laws. Plaintiffs support their allegations with a structural study conducted in 1989 by an engineer, Dr. Rafael Jiménez, which indicates that the condominium is in danger of collapsing, and proffered evidence demonstrating that Defendants directly paid Agapito Font from their own corporate accounts instead of following the proper compensation procedure. Plaintiffs contend Civil No. 99-1375 (JAF) that the building contains structural defects which do not meet applicable building standards, and that Defendants' fraudulent scheme resulted in state certification and the

permits necessary to sell and finance Condominio Segovia".

As an example of this jurisdictional problem, in Rodriguez v. Baldrich, op. cit., a case originally filed at the state court. The Circuit Court had to send the case to the District Court in order to determine how the state law applied to that set of facts. In this case, we do not have such a problem because the Supreme Court of Puerto Rico already decided that the security in the construction is of primary public interest. See Géigel, op. cit. If the District Court already determined the involvement of Respondent in the construction, and the security of the structure of the Condominium is in question, this Honorable Court should allow this case to continue.

If local rule controls this case, in order to determine public interest or the effect on the family nucleus, local rule does not contemplate the subsequent disappearance of the homestead of more than 300 families with more than 1,000 people. In Puerto Rico, the homestead is a right for the family under 31 L.P.R.A. Sec. 1851.

The Respondents went as far as alleging that the U.S. Supreme Court or the First Circuit Court do not follow principles of public interest. For that purpose, Respondents cited the following cases in their opposition to the appeal to the First Circuit Court. Those cases do not have any relationship with public interest and do not have any relationship with Puerto Rico law. They will be examined separately.

In Johson v. SCA Disposal, 931 F.2d 970; 1991 U.S. App. LEXIS 8189 (1991), the First Circuit Court decided that when a cause of action is not included on the complaint, a second action will be barred by federal or state res judicata. In this case, no public interest existed. Under Rose v. Town of Harwich, 778 F.2d 77 (1st Cir. 1985), the First Circuit

Court acknowledged that there are "undue hardship exemptions" to allow to set aside principles of res judicata. This case also does not have any relationship with public interest. In United States v. Cunan, 156 F.3d 110 (1st Cir. 1998) there is no controversy related to public interest. In Kale v. Combined Insurance Co., 924 F.2d 1161 (1st Cir. 1991), also cited by Respondents, do not have any relationship with public interest. Kale v. Combined Insurance Co., op. cit., is also a case that in no way deals with public interest. In *Semtek International Inc. v. Lockheed Martin Corp.* 531 U.S. 497, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001), also a case that deals with statute of limitations and in no way is related to public interest. Doe v. In re Urohealth Systems, Inc., 216 F.3d 157 (1st Cir. 2000), cited by Respondents to the First Circuit Court and does not have any relationship to public interest. In Porn v. National Grange Mutual Insurance Co., 93 F3d. 31 (1st Cir. 1996), another case that does not deal with public interest. In re El San Juan Hotel Corp., 841 F.2d 6 (1st Cir. 1988), a case dealing with bankruptcy and in no way related to public interest. In Apparel Art International Inc. v. Amertex Enterprises, Ltd. 48 F.3d 576 (1st Cir. 1995), a case dealing with RICO Act and in any way related to public interest. In Federated Department Stores Inc. v. Moitie, 452 U.S. 394 (1981), a case dealing with an Antitrust action. Some plaintiffs were allowed to continue with the case.

It seems clear that the District Court and the First Circuit Court did not give any attention to the controversy of public interest and the situation of the family nucleus when the lost of its homestead is at stake. This situation was raised on Petitioners' motions and briefs in both the District and First Circuit courts. Results will be the same under federal or state jurisdiction under public interest consideration.

For example in Futura Development Corp. v. Centex, 761 F.2d 22 (1st Cir. 1985), the First Circuit Court accepted

the validity of principles of fraud and public interest. See also Medina v. Chase Manhattan Bank, N.A., 737 F.2d 140 (1st Cir. 1984); Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325 (1st Cir. 1991), talking and acknowledging about public interest litigation; Rodriguez v. Baldrich., op. cit.; Romany v. Rico, 742 F.2d 32 (1st Cir.1984); American Airlines Inc. v. Cardoza-Rodriguez, 133 F.3d 111 (1st Cir. 1998); Géigel v. Mariani , op. cit., and González v. Agostini, op. cit., declaring that the safety in the construction is of public interest. See also Decosta v. Columbia Broadcasting System Inc., 520 F.2d 499 (1st Cir. 1975). At the Supreme Court we can read the following cases related to public interest: United States v. E.C. Knight Company, 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1995).; Equal Employment Opportunity Commission v. Waffle House, Inc., No. 99-1823 (U.S. 01/15/2002); Barden v. Northen Pacific Railroad Company 154 U.S. 288, 38 L. Ed. 992, 14 S. Ct. 1030 (1894). In this last cited case, the Supreme Court defined what is public interest. The Court said:

> "[T]he general rule, when grants relate to matters of public interest, is thus forcibly expressed by Chief Justice Taney: "The object and end of all government," said the Chief Justice, speaking for the court, "is to promote the happiness and prosperity of the community by which it established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. . . . The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to

> accomplish the ends of its creation; and the functions it was designed to perform transferred to the hands of privileged corporations." Charles River Bridge Co. v. Warren Bridge Co., 11 Pet. 420, 547 (1837).

The District Court under Hon. Judge Carmen Cerezo should have abstained to exercise its jurisdiction. The complaint was filed with the state court. This only affects the desirability of abstention. See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 21-22, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). The Petitioners, among other things, were seeking to get a remedy, under the determinations made Hon. Judge Fuste under the public interest and safety of family nucleus doctrine that the District Court did not even address on its judgment.

The abstention doctrine, according to the First Circuit Court is required when: (1) whether either court has assumed jurisdiction over a res; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law controls; and (6) whether the state forum will adequately protect the interests of the parties. See among others, Rivera-Puig v. Garcia-Rosario 983 F.2d 311 (1st Cir. 1992). Romany v. Colegio de Abogados de P.R., 742 F.2d 32 (1st Cir. 1984); Santasucci v. Gallen, 607 F.2d 527 (1st Cir. 1979). In Arzuaga-Collazo v. Oriental Federal Savings Bank, 913 F.2d 5 (1st Cir. 1990), the First Circuit even admitted that those cases involving construction defects usually are seen in the state courts. following the state jurisprudence. In this case, none of the forums followed the principles of public interest on the security of the construction that dictates the policy when the construction in question presents a clear danger to the inhabitants.

Petitioners should point out that the First Circuit Court went into looking some three previous judgments that were never part of the appeal filed. On its judgment the First Circuit states at footnote that in the "interest of brevity, we refrain from discussing the lawsuits filed by plaintiffs against defendants in 1985, 1992 and 1995 over the same issue". The First Circuit Court overviewed the fact that none of the parties involved appealed the judgment entered by Hon. Judge José Fusté that made a determination as to that there was no res judicata or collateral stoppel for this case. There were no documents from any judgments included for the record in order for the First Circuit Court to inspect or read in order to make such determination. In addition, Hon. Judge José Fusté specifically went over those judgments and made a determination that the exemption of fraud upon the court applied in that case and there was no bar for res judicata or collateral stoppel.

The First Circuit Court also made a determination that "plaintiffs failed to satisfy the pleading requirements after eight years of litigation" in order to reach its decision. It seems clear that if the judgment entered by Hon. Judge José Fusté determined in the year 2000, that the fraud upon the court was not barred by res judicata or collateral stoppel, therefore Petitioners could not be alleging fraud upon the court for the past eight years. It seems that the burden for the extension of the litigation should be placed on Respondents' shoulders and not upon Petitioners' shoulders. Especially when Respondents' conduct amount to a fraud upon the Court and state agencies.

It is clear that the District Court determined how Respondents made their participation or involvement in the construction of the building. At present, the building in question does not have the multi peril insurance required for this type of building because there is no insurance company to take any risk with this structure.

Conclusion:

As we have seen, there is no obstacle or legal impediment for not allowing the Petitioners to continue with their case at the state level. Being Hon. Judge José Fusté's decision the only judgment related to the fraud upon the court. This Honorable Court could set aside that judgment in order for the Petitioners to seek a remedy at the state court.

Neither the First Circuit Court nor the District Court followed the state law for res judicata and collateral stoppel. Federal law was applied in this case without considering the situation of the building in question that can collapse. That even the District Court under Hon. Judge José Fusté was convinced of Respondents' involvement in the ultimate ruin of the building in question by paying directly to the personnel responsible along with Respondents of the present situation.

Therefore, the Petitioners most respectfully request from this Honorable Court to Grant the petition for certiorari.

Respectfully submitted:

José M. Tous-Rodríguez
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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-1985

CARMEN CABALLERO-RIVERA,
TALI BENET-SOTO,
Plaintiffs, Appellants,
V.
THE CHASE MANHATTAN BANK, N.A.,
HOUSING INVESTMENT CORP.,
Defendants, Appellees.

JUDGMENT

Entered: January 10, 2002

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court:
Richard Cushing Donovan, Clerk
By:
Chief Deputy Clerk
[cc: Messrs. Tous-Rodriguez & Burgos-Perez]

United States Court of Appeals
For the First Circuit

No. 01-1985

CARMEN CABALLERO-RIVERA,
TALI BENET-SOTO,
Plaintiffs, Appellants,
V.
THE CHASE MANHATTAN BANK, N.A.,
HOUSING INVESTMENT CORP.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. José Antonio Fusté, U.S. District Court Judge]

Before
Boudin, Chief Judge, Kravitch, * Senior Circuit. Judge, and Torruellas, Circuit Judge.

José M. Tous Rodríguez, for appellants.
Heriberto J. Burgos-Pérezm with whom Fiddler, González & Rodríguez LLP and Mariano Mier-Romeu, were on brief, for appellees.
January 10, 2002

*Of the Eleventh Circuit, sitting by designation

Per Curtain. Plaintiffs-appellants Carmen Caballero Rivera and Tali Benet-Soto appeal from the district court's dismissal of their case. Specifically, appellants argue that the district court erred in applying the doctrine of res judicata to

preclude their claim.

A brief examination of the procedural history of this case, however, reveals the accuracy of the district court's ruling. In 1999, plaintiffs filed suit in district court claiming that defendants had defrauded them by submitting false documents to the Superior Court of Puerto Rico in a previous lawsuit between the parties.[1] Shortly after the suit was filed, defendants moved for summary judgment. The district court granted defendants' motion on the grounds that plaintiffs failed to raise a genuine issue of material fact by not satisfying the heightened pleading requirements of Federal Rule of Civil Procedure 9(b)[2]. Plaintiffs did not appeal the district court's ruling.

Instead, plaintiffs filed this suit in Puerto Rico Superior Court. Defendants removed the case to federal court and filed a motion to dismiss. The district court granted the dismissal, ruling that the doctrine of res judicata precluded plaintiffs' claim.

1.In the interest of brevity, we refrain from discussing the lawsuits filed by plaintiffs against defendants in 1985, 1992, and 1995 over the same issue.

2 Federal Rule of Civil Procedure 9(b) provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.,,

The doctrine of res judicata promotes the goals of fairness and efficiency by preventing vexatious or repetitive litigation. See Commit v. Sunnen, 333 U.S. 591, 597 (1948). A claim will be precluded by res judicata if the following elements are demonstrated: " (1) a final judgment on the merits in an earlier suit, (2) sufficient identicality between

the causes of action asserted in the earlier and later suits, and (3) sufficient identicality between the parties in the two suits." Gonzalez v. Banco Central Corp., 27 F.3d 751, 755 (1st Cir. 1994).

In the instant case, all three factors are so clearly present that only a brief discussion of them is necessary. First, the summary judgment ruling that disposed of plaintiffs' earlier claim constitutes "a final judgment on the merits." See Dowd v. Soc'y of St. Columbans, 861 F.2d 761, 764 (Ist Cir. 1988) (noting that " [s] ummary judgment constitutes a final judgment on the merits for purposes of applying res judicata").[3] Second, by plaintiffs' own admission, the instant case is identical to the previous suit. Third, there is no question that the two suits contain the same parties.

3 Without considering the merits of the prior dismissal, we find no procedural error in the district court's decision to grant summary judgment on the basis of plaintiffs' inability to satisfy the pleading requirements of Federal Rule of Civil Procedure 9(b). See, e. cf., Murr Plumbing, Ing. v. Scherer Bros. Fin. Servs. , 48 F.3d 1066, 1070 (8th Cir. 1995) (ruling that "[a] district court may enter summary judgment dismissing a complaint alleging fraud if the complaint fails to satisfy the requirements of Rule 9 (b) ") ; see also Whalen v. Carter, 954 F.2d 1087, 1098 (5th Cir. 1992) (same) . our position is further buttressed by the fact that plaintiffs failed to satisfy the pleading requirements after eight years of litigation.

Because we find no error in the district court's application of res judicata, we affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CARMEN CABALLERO-RIVERA and
TALI BENET-SOTO
Plaintiffs
Vs CIVIL 00- 18 5 8CCC

THE CHASE MANHATTAN BANK, N.A.
HOUSING INVESTMENT CORP.
Defendants

JUDGMENT

For the reasons stated in our Order of this same date, this action Is DISMISSED. Costs and fees are awarded to the defendants.

SO ORDERED AND ADJUDGE

At San Juan, Puerto Rico, on May 17, 2001.
(signed)
CARMEN CONSUELO, CEREZO
United States District judge

IN THE UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF PUERTO RICO

CARMEN CABALLERO-RIVERA and
TALI BENET-SOTO)
Plaintiffs
Vs CIVIL 00-1858CCC
THE CHASE MANHATTAN BANK, N.A.
HOUSING INVESTMENT CORP.
Defendants

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0 R D E R

This is another case In the continuing saga of the construction defects of Segovia Condominium, brought by two residents. Once again, the case was flied In the Court of First Instance of Puerto Rico and removed here by defendant Chase Manhattan Bank on the grounds of diversity of Jurisdiction. As is the pattern, Chase has filed a dispositive motion, In this case, a Motion to Dismiss **(docket entry 10)** based on grounds of res judicata and collateral estoppel and plaintiffs have opposed It **(docket entry 11).** Plaintiffs rationalize the filing of this suit on the decision in their recent case, Caballero v. The Chase Manhattan Bank, et al., Civil 99-1375 (JAF). They draw our attention to statements by judge Fuste in his opinion:

... Congress enacted Rule 60(b) to allow a party to attack collaterally a previous determination by proving the previous judgment arose from fraud....

... When a previously unlitigated fraud claim that, If true., would destroy the foundation of the state court judgment at

Issue In accordance with state law., a district court should permit a complete evidentiary disposition on the fraud point. To do so temporarily Ignores any issue of claim preclusion encompassed in the doctrine of res judicata. Then, should the district court determine that fraud was committed pursuant to state law, it may set aside the previous state court Judgment. (Opinion, page 10.) The Court concluded that the plaintiffs were alleging a previously unlitigated claim of fraud, and, the fraud exception applied. The court then went on to examine the evidence on the fraud point, thereby setting aside momentarily the claim preclusion of the doctrine of res judicata." (Id. at p. 12.)

The court found that the plaintiffs had failed to meet the required standard of particularity:

... Their complaint is filled with bald assertions of a conspiracy which are unsupported by any solid facts. The closest Plaintiffs come to meeting the standard Is the allegation that engineer Agapito Font was paid by means other than accepted compensatory practices.... [T]his is not enough. Plaintiffs fall to show how the alleged fraud was perpetrated. Furthermore, Plaintiffs' allegations In no manner demonstrate that engineer Agapito Font report was false. Rather, Plaintiffs rely upon a structural study they commissioned In 1989 which concluded that the building was In a horrendous condition and could collapse. This Is simply not enough.

(Opinion, page 13) The court further notes that, "Audaciously, Plaintiffs are attempting to obtain some more bite at the proverbial apple In this case and have yet again failed to meet the heightened pleasing standards of which they were clearly on notice."

Of particular concern to us is paragraph 31 of the complaint, as translated:

Contrary to the judgment for dismissal from the Federal District Court, case 99137SUAF), supra, the plaintiff alleged

fraud to the Federal Court through he [sic] use of engineer Agapito Font reports, nevertheless, a reconsideration was not filed before that forum, since It Is well known that the same are sometimes resolved a year or more later, and the present case requires Immediate attention due to the hazardous condition of the building.

Plaintiffs' Intent is clear. Rather than ask for reconsideration of the order or appeal judge Fuste's decision to the Circuit Court,, they chose to file the matter anew, In the Commonwealth court.

Plaintiff's Inarticulately argues that the dismissal was based on F.R.Cv.P. Rule 9(b) and, therefore, does not constitute a decision on the merits. The fact is, however, that as seen above, judge Fuste did address the merits of the allegations and found that they did not sufficiently demonstrate a cause of action for fraud. If plaintiffs actually did have a fraud claim which could have been brought to this forum,, they could have requested the opportunity to amend the complaint. Their failure to do so, and their failure to appeal from that decision, makes judge Fuste's decision the one by which we are bound.'

Accordingly, for the above-stated reasons, the Motion to Dismiss (docket entry 10) is GRANTED. Because this is one more episode In a long line of vexatious suits, we award costs and fees to the defendants.

SO ORDERED.

At San Juan, Puerto Rico, on May 17, 2001.

CARMEN CONSUELO DE CEREZO,
United States District judge

'We find plaintiffs' argument that, because the Issue Is a state

cause of action. the case should be remanded. to be meritless. This action is here pursuant to our diversity jurisdiction.

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

CARMEN CABALLERO RIVERA,ET AL., Plaintiffs, v THE CHASE MANHATTAN BANK; ET AL., Defendants.	Civil 99-1375 (JAF)

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OPINION AND ORDER

Plaintiffs, Carmen Caballero Rivera and Talí Benet Soto, bring this diversity action for relief of judgment against Defendants, the Chase Manhattan Bank, N.A. and its subsidiary Housing Investment corporation, alleging that Defendants committed fraud in prior state court proceedings concerning the certification and legality of alterations and repairs done on a condominium, "Condominio Segovia" located in Hato Rey, Puerto Rico. Plaintiffs move for for partial summary judgment Summary judgment. They contend that the condominium is in such poor that it may collapse at any moment and that, as a result, it could not have met the local building and construction standards which Defendants alleged in the state court proceedings. Defendants oppose Plaintiffs' motion and cross-move for summary judgment. Civil No. 99-1375 (JAF).

1. Factual Background

Plaintiffs, a group of homeowners who purchased apartments at the condominium and the Board of the condominium, filed suit in the Puerto Rico Superior Court, No. 79-994 (806), against Defendants. They alleged nonconformance with local building standards and regulations throughout the renovation and repairs to the building that Defendants financed. The state court granted Defendants' unopposed summary judgment motion.

Plaintiffs allege that Defendants, in submitting their motion for summary judgment, committed a fraud in the state court proceedings by presenting fraudulent documents which attested that the condominium was repaired and certified according to state construction laws. Specifically, Plaintiffs maintain that engineer Agapito Font openly conspired with Defendants by appearing at a deposition and averring falsely that the alterations and repairs made by Defendants did not negatively impact the structure of the *building* and met all applicable construction laws. Plaintiffs support their allegations with a structural study conducted in 1989 by an engineer, Dr. Rafael Jim6nez, which indicates that the condominium is in danger of collapsing, and proffered evidence demonstrating that Defendants directly paid Agapito Font from their own corporate accounts instead of following the proper compensation procedure. Plaintiffs contend that the building contains structural defects which do not meet applicable building standards, and that Defendants, fraudulent scheme resulted in state certification and the permits necessary to sell and finance Condominio, Segovia.

Defendants have submitted a cross-motion for summary judgment and in opposition to Plaintiffs, partial summary judgment motion. Specifically, they allege lack of subject matter jurisdiction and that the facts upon which Plaintiffs base their motion are insufficient, as a matter of

law, to set aside final judgments.

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Procedural Background

Plaintiffs filed a state court complaint in 1985. Plaintiffs allege that during that proceeding, they were unable to oppose Defendants' motion for summary judgment because Defendants withheld, at all times prior to the court's disposition of the matter, the structural plans for the building which Plaintiffs needed in order to oppose the motion.

In 1992, Plaintiffs then filed a *motion in* District Court alleging Racketeering influenced and Corrupt Organization (RICO) charges against Defendants pursuant to **18 U.S.C. 1961-1968 (1982).** The court dismissed the complaint for failure to meet the heightened pleading requirements necessary to sustain a RICO claim. See Tali Benet Soto v. The Chase Manhattan Bank, N.A. et al, 791 F.Supp. 914, 917 (D.P.R. 1992).

In 1995, Plaintts'counsel in the instant action filed a personal cause of action for relief against the judgment in the state court alleging that Defendants had committed a fraud in the state court. The court dismissed the action for lack of standing, since Plaintiffs'counsel no longer resided in the condominium.

In 1999, Plaintiffs filed the instant action for relief of judgment pursuant to Fed. R. Civ. P. 60 (b). Defendants answered Plaintiffs'complaint, moved for dismissal, and asserted a number of affirmative defenses, including: (1) lack of subject mater jurisdiction; (2) the complaint fails to state a claim upon which relief may be granted; (3) the complaint is barred by the doctrine of res judicata; (4) the complaint is collaterally estopped by the previous federal and state actions; (5) the complaint is time barred by the applicable statute of limitations; (6) Plaintiffs

have failed to allege fraud with specificity; (8) lack of proximate cause; (9) Plaintiffs failed t6o mitigate damages; (10) the amount of damages claimed by Plaintiffs is exaggerated and speculative; (11) Defendants did not exceed their legitimate functions as lenders; (12) Plaintiffs are obstinately this action and should, therefore, be liable to Defendants for their attorneys fees, costs, and expenses to defend this case, and (13) Plaintiff's counsel has unreasonably and vexatiously multiplied proceesings in this case and should be santioned.

Plaintiffs opposed Defendants'motion to dismiss and, thereafter moved to submit and amended complaint.

III

Summary Judgment Standard

"The core purpose of summary judgment is to pierce the boilerplate of the pleadings, and examine the parties, proof to determine whether a trial actually is necessary. Vega-Rodriquez v. Puerto Rico Telephone Co., **110 F.3d 174, 178** (16" Cir. 1997) (quoting Wynne v. Tufts Univ. Sch. of Med., *976* F.2d *791, 794* (Vt Cir. *1992)).*

Therefore, if the pleadings, depositions, answers to interrogatories, admissions, and any affidavits on file show that there is no genuine issue as to a material fact, then the moving party is entitled to judgment as a matter of law. See FED. R. CIv. P. 56 (c) .

Where the moving party does not have the burden of proof at trial, that party must make a showing that the evidence is insufficient to support the nonmoving party's case. See Celotex Corp. v. Catrgtt. *477 U.S. 317, 325 (1986).* Once the initial showing has been made, it is up to the *nonmoving party* to establish the existence of a genuine disagreement as to some material fact. See United States *v.* One Parcel of Real Property with **Bldas.,960 F.2d 200, 204 (1st Cir. 1992).** In this context, "genuine means that "the evidence is such that a reasonable jury could return a verdict

for the nonmoving party, "and a "material fact" is one which "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 4 77 U.S. 242, 248, 257 (1986) . Throughout this analytical process, any doubt as to the existence of a *genuine issue* of fact *should be* resolved against the moving party, see Adickes y. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970), and courts "must view the evidentiary record in the light most hospitable to the nonmovant and must indulge all reasonable inferences in his favor. Sheinkoof v. Stone, 927 F.2d 1259, 1262 (lot Cir. 1991); Griggs-Rvan y. Smith, 904 F.2d 112, 115 (let Cir. 1990).

IV.
Analysis

We are faced with a number of issues in this case, the most prescient being whether federal jurisdiction exists. Defendants .claim there is no jurisdiction because we are without authority to hear direct appeals of state court decisions and Fed. R. Civ. P. 60(b) does not provide an independent ground for jurisdiction.

Plaintiffs respond that jurisdiction is premised upon diversity of citizenship in the present action and fraud in the state proceeding pursuant to Fed. Civ. R. 60(b).[1] Thus, we are

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[1] Rule 60(b) provides, in relevant part:

1. On motion upon scuh terms are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for....(3) fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party.....The motion shall be made wqithin a reasonable time, and for reasons (2), and (3) not more than one year after the judgment, order, or profceeding was entered or taken. This rule does not limit the power or a court to

presented with a mottled web of jurisdictional issues which need to be untangled to answer our inquiry.

A. Diversitv Jurisdiction

Federal Courts have limited jurisdiction, and statutes which grant jurisdiction must be strictly construed. See Thomson v. Gaskill, 315 U.S 442, 446 (1942), This case involves no federal question, This, jurisdiction depends solely upon diversity of citizenship of the parties, Section 1332 of Title 28 of the United States Code proceeds federal courts with diversity jurisdiction. See 28 U.S.C. Sec. 1332 (1994). Diversity jurisdiction requires complete diversity between all the plaintiffs and all the defendants and an amount in controversy of $75,000.00 or more. See Strawbridge v. Curtiss, 7 U.S. (3Cracnch) 267 (1806); Casas Machines, Inc. v. Mita Copystar America, Inc., 42 F. 3d 668, 673 (lot Cir. 1994). Where a plaintiff's claim of diversity is challenged, the plaintiff has the burden of proof. See Thomson v. Gaskill, 315 U.S. 442, 446 (1942); Hawes v. Club Ecuestre El Comandante, 598 F.2d 698, 702 (1st Cir 1979). Diversity is determined as of the time of the filing of the complaint. See Kidd v. Hilton of San Juan, 251 F.Supp. 465, 468 (D.P.R. 1966)

Plaintiffs base jurisdiction upon diversity of citizenship. They allege complete diversity between all Plaintiffs and all Defendants, and sufficient damages to satisfy the amount in controversy requirement. Therefore, they have stated a prima facie case of diversity of citizenship which Defendants have not challenged.

Defendants have, however, challenged our jurisdiction in this case upon the underlying cause of action,

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entertain and independent action to relieve a party from a judgment, order or proceeding ..... to set aside a judgment for fraud upon the court..
Fed. R. Civ. P. 60 (b).

fraud in the state court proceedings. Defendants maintain that we lack subject matter jurisdiction to review collaterally prior final judgments of the Puerto Rico Superior Court. While it is true that federal courts generally lack jurisdiction to review judgments and decisions of state courts, See Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1982); see also 28 U.S.C. S 1257 (1990), we are dealing with an allegation of fraud which, at times, is treated differently.

B. Res Judicata, Full Faith and Credit, and the Fraud Exception

The fundamental doctrine of res judicata, rests at the core of our judicial system[2]. The doctrine prohibits a claim from being litigated repetitiously outside of the normal appeals process, and furthers the goals of finality and certainty by the application of the doctrine. Standing alongside the fundamental doctrine of res judicata is the constitutional mandate that all courts in the United States, in general, must give full faith and credit to the decisions of other courts, be they territorial, state, federal, or special tribunals. See U. S. CONST. art. IV, S 1.[3] The full faith and credit principle also

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[2] Res judicata is a "general and well-established doctrine conceived in the light of the maxim that the interest of the state requires that there be an *end* to litigation a maxim which comports with common sense as well as public policy." Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) (Quoting Reed v. Allen, 266 U.S. 191, 198-99 (1932)).

[3] The Clause provides that [f]ull Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State".U.S. CONST. art. IV, S 1.

furthers the goals of certainty, finality, and comity in legal dealings within our nation. Nonetheless, the Federal Rules of Civil Procedure contain an exemption to the strictures of res judicata in cases, like the instant action, in which there is an allegation of fraud which underlines the original state courts proceeding. It is a general precept that judgments obtained by fraud do not merit the routine deference courts normally grant to previous determinations. Accordingly, Congress enacted Rule 60(b) to allow a party to attack collaterally a previous determination by proving that the previous judgment arose from fraud. See FED. R. Civ. P. 60 (b).

Of course, this is not the case if fraud was the subject of the a previous state litigation. In that case, res judicata would apply. See Heiser v. Woodruff, 327 U.S. 726, 736-37 (1946) ("Nor can a[] [collateral] attack be sustained on a judgment allegedly procured by fraudulent representations of the plaintiff, when the charge of fraud has been rejected in previous litigations by the parties to the suit in which the judgment was rendered, or their representatives.*). In other words, we are authorized to ease the strictures of res judicata doctrine in certain circumstances. When a previously unlitigated fraud claim that, if true, would destroy the foundation of the state court judgment at issue in accordance with state law, a district court should permit a complete evidentiary disposition on the fraud point. To do so temporarily ignores any issue of claim preclusion encompassed in the doctrine of res judicata. Then, should the district court determine that fraud was committed pursuant to state law, it may set aside the previous state court judgment. The First Circuit has explained the interplay between federal and state judicial determinations in the case of the fraud exception. See In re Giorgio, 862 F.2d 933, 936 (1" Cir. 1988). A federal court is empowered to set aside a state court judgment only if, in accordance with state law, the judgment

is faulty. "[Tlhere can be no life to a state law claim, when a state court in a related prior proceeding authoritatively says that none exists. Giorgio, 862 F.2d at 936 (citations omitted) Hence, all fraud determinations made by federal courts turn upon the applicable state law. In other words, a federal court is precluded from making a fraud determination if a state court has already passed judgment on the same claim. This conclusion is necessary to preserve the balance of powers between state and federal judiciaries and to ensure that federal courts do not abrogate the Constitution and seize the power of appellate review over state court decisions. Our inquiry, then, is whether the fraud exception applies in this case. We find that it does.Plaintiffs allege a previously unlitigated claim of fraud, that engineer Agapito Font conspired with Defendants to present false documents and testimony to the state court, that, if true, would erode the *foundation of* the state court judgment at issue according to state law. Accordingly, we will examine the evidence on the f raud point, thereby setting aside momentarily the claim preclusion of the doctrine of res judicata.[4]

1. Fraud and Rule 9

As a general matter, in an action with fraud at its

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[4] We note that Defendants also raise a statute of limitations defense to the fraud claim. However, the Supreme Court has held that "equity,* could enjoin the enforcement of a judgment at law obtained by the use of a forged *instrument and* false testimony if the falsity was not discovered until after the judgment had been entered and'the time for a new trial motion had run." Bailey v. Internal Revenue Service, 188 F.R.D. 346 (D. Ariz. 1999) (citing 11 WRIGHT, MILLER & KANE, 5 2681

center. Fed.R. Civ. P. 9 [5]imposes a heightened pleading standard. See Lucia v. Prospect St. High Income Portfolio, Inc., 36 F.3d 170, 174 (1st. Cir 1994) Rule 9(b) "requires specification of the time, place, and content of an alleged false representation, but not the circumstances or evidence from which fraudulent intent could be inferred." McGint v. Beranger Volkswagen, Inc., 633 F.2d 226, 228 (19' Cir.1980) ; see also Greebel v. FTP-Software. Inc., 194 F.3d 185, 193 (1st. Cir 1999).

The purposes behind Rule 9(b) are threefold: (1) to place the defendants on notice and enable them to prepare meaningful responses; (2) to preclude the use of a groundless fraud claim as a pretext to discovering a wrong or as a strike suit;' and (3) to safeguard defendants from frivolous charges which might damage their reputations." New England Data Services. Inc. v. Becher, 829 F.2d **286, 289 (lot** Cir. **1987);** see also Suna v. Bailey Cori), 107 F. 3d 64, 68 (1st. Cir . 1997)

Plaintiffs in this case have failed to meet the required standard of particularity. Their complaint is filled with bald assertions of a conspiracy which are unsupported by any solid facts. The closest Plaintiffs come to meeting the standard is the allegation that engineer Agapito Font was paid by means other than accepted compensatory practices, i.e., from Defendants, escrow account. However, this is not enough. Plaintiffs fail to show how the alleged fraud was perpetrated. Furthermore, Plaintiffs' allegations in no manner demonstrate that engineer Agapito Font's report was false. Rather, Plaintiffs rely upon a structural study they commissioned in 1989 which concluded that the building

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[5] Rule9(b) provides:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

was in a horrendous condition and could collapse. This is simply not enough. See id. at 68 (quoting Rayduk v. Lanna, **775 F.2d 441, 444** (1st. Cir. 1985) ("Mere allegations of fraud, corruption or conspiracy, averments to conditions of mind, or referrals to plans and schemes are too conclusional to satisfy the particularity requirements, no matter How many times such accusations are repeated."). A study conducted four years after the lawsuit in which it is offered as proof of fraud is not a reliable means of supporting Plaintiffs, claims our conclusion is reinforced by the fact that Plaintiffs have been engaged in litigation surrounding this very issue for eight years, to no avail. *In 1992, Plaintiffs* filed their civil RICO claim a in district court. As Rule 9(b) applies to the predicate acts underlying a civil RICO claim, -see New England Data Services. Inc. y.Becher , 829 F.2d 286 (1st. Cir. 1987) [6] the district 'court dismissed the claim for failure to meet the heightened pleading *standards. See* Tali Renet Soto et al. v. Chase Manhattan Bank. N.A. et al.. 791 F. Supp 914, 917 (D.P.R. 1992) Audaciously, Plaintiffs are attempting to obtain one more bite at the proverbial apple in this case and have yet again failed to meet the heightened pleading standards of which they were clearly on notice. We do not sanction such behavior. Plaintiffs, thoroughly advised of the heightened pleading standard, have failed, once again, to meet it.

In this same vein, we find that Plaintiffs have failed to state an independent action pursuant to Rule 60(b). See

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[6] While Becher specifically dealt with predicate acts of mail and wire fraud, the court announced, with respect to Rule *9(b),* the "degree of specificity is no more nor less than we have required in general fraud and securities fraud cases." -1d. at 290.

United States v. Beggerly, 524 U.S. 38, 46 (1998) (stating that "an independent action 2 should be available only to

prevent a grave miscarriage of justice.") if Plaintiffs cannot meet heightened pleading standards after eight years of litigation, it is clear that no serious malignment of justice is occurring. We, therefore, grant Defendants'motion for summary judgment.

V.

Conclusion

We **GRANT** Defendants motion for summary judgment. No sanctions are imposed in this case.
This Opinion and order disposes of Docket Document NOS. 11, 14A, 14B, and 17.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 30 day of March, 200
Jose Antonio Fuste
U. S. District Judge

CERTIFIED TRANSLATION

COMMONWEALTH OF PUERTO RICO
SUPERIOR COURT - SAN JUAN PART

CARMEN CABALLERO RIVERA, TALI BENET SOTO Plaintiffs vs. THE CHASE MANHATTAN BANK; HOUSING INVESTMENT Defendants	CASE: KAC00-2270(902) RE: CIVIL ACTION; DAMAGES; HIDDEN DEFECTS

COMPLAINT

TO THE HONORABLE COURT:

COMES NOW party plaintiff, through their undersigned counsel, and respectfully state, allege and pray as follows:

1. Housing Investment Corp., was a subsidiary of Chase Manhattan Bank, N.A., actually known as The Chase Manhattan Bank, and both of them constructed, developed, repaired and promoted the building known as Condominio Segovia.
2. The defendants are liable for all actions mentioned in the present complaint, by granting the financing to the constructors for the construction of the building known as Condominio Segovia, breaching the clauses of the interim loan contract, violating Puerto Rico's construction permits, disbursing monies from the interim loan in order to try to

repair the building without following the approved blue prints by the concerned agencies, with no consideration of the building codes, and leaving the structure in ruins and in danger of collapsing, in total disregard of the persons living there.

3. The defendants paid an engineer by the name of Agapito Font, with their corporate checks, in order for him to illegally intervene with the building and to cover up a series of deficiencies leaving it in ruins and in danger of collapsing.

4. This action is of primary public interest, for which it does not apply the doctrine of judged matter or collateral impediment, be it under its traditional version or the version known as intrajurisdictional jurisprudence.

5. The defendants committed fraud against the Superior Court of Puerto Rico in the case 79-7994, Sonia Ortiz Ortiz v. The Chase Manhittan Bank, N.A.

FRAUD TO THE COURT:

6. The building known as Condominio Segovia, shifted from its foundation.

7. The defendants, as it comes forth from some minutes dated January 14, 1975, represented by Messrs. Dionisio Ramirez and Manuel Jimenez, proceeded to make certain agreements for engineer Agapito Font to proceed with the alignment of the building known as Condominio Segovia, without following the blue prints originally approved for the construction of the same by the concerned agency, and leaving the building in ruins.

8. . That while these interventions were being made by said engineer Agapito Font, some related reports were distributed wherein he informed the agreed upon illegal interventions in order for him to be paid for his services by the defendants.

9. That prior to the reports made by engineer Agapito Font, he would go by the offices of Housing Investment Corp., and Housing Investment Corp., subsidiary of Chase Manhattan Bank, would pay for his fees with corporate checks.10. That with the purpose of making all those illegal repairs, the defendants put in an escrow account the amount of $655,000.00 from which payments were made for the alleged repairs, knowing that the same were illegal and would endanger the security of the people in the building.

11. Engineer Agapito Font appeared for a deposition and under oath declared that the reports were certifications, that he had fixed the building, and that the same was in perfect condition.

12. Later on, the defendants, during the month of November 1994, used that evidence in a motion under oath for summary judgment, to obtain the dismissal of case 79-7994, supra, before the Superior Court of Puerto Rico.

13. That among other things, engineer Agapito Font cut an unnumbered amount of iron rods from the transversal weight columns "shear walls", and substituted them with steel plates.

14. That Agapito Font stated in a deposition under oath having repaired and certified the Condominio Segovia, presenting the referred reports or briefs, knowing that the building's concrete walls do not comply with the demands of the Building Code.

15. That this technique utilized causes a column defect, that when force is made with the concrete, the same breaks and the building may collapse.

16. That the shear walls provide ductility for the building in cases of hurricanes or earthquakes. Therefore, the buildings lacks capacity to withstand earthquakes or hurricanes.

17. That in a Motion for Summary Judgment the attorneys for the defendants appeared and used the reports or briefs of engineer Agapito Font, under oath, and before the

consideration of the Superior Court, in case 79-7994, and obtained the dismissal of the pending litigation through summary judgment oh January 31, 1986, knowing that the reports were created in an illegal manner and that perjury was being committed.

18. That the judgment of the Superior Court dated January 31, 1986, determined that the said construction deficiencies were repaired and certified by. engineer Agapito Font, this based on the reports, briefs or certifications of the repairs presented by the defendants before the court in order to perpetuate the fraud by the attorneys of the defendants.

19. That litigation 79-7994, supra, had been presented in order to find a remedy to the hidden defects affecting said building, among these, the cutting of the iron rods in the columns "shear walls", for which it was therefore dismissed because of the defendant's fraudulent acts, by not being able to evidence the defects.

20. That no engineer in Puerto Rico can vary or change approved blue prints for construction under Planning Regulation #7, known by law as Building Regulation, administered by the Regulation and Permit Administration (ARPE).

21. In the case *Federal Insurance Co. v. Housing Investment Corp.*, 93 BR 838 (1988), the Federal Bankruptcy Court determined, also, that the defendants had also advanced the amount of $84,982.61, from their pocket and directly to other subcontractors in order to conclude the construction of the building known as Condominio Segovia.

22. The defendants totally controlled the process of construction and repair of the building and left it in ruins.

23. In its judgment for dismissal in the case of *Tali Benet Soto. et* als. *V. The Chase Manhattan Bank, et als.* 99-1375 (JAP), the Federal District Court determined that the defendant Housing Investment Corp., directly paid engineer Agapito Font and how the fraud alleged herein was

committed against the court, to later on dismiss the same under Rule 9(b) of Civil Procedure. (Included is the, decreed judgment.)

24. The plaintiffs were not able to oppose the Motion for Summary Judgment on State case 79-7994; supra, because:

a. Dr. Rafael Jimenez, who made the structural study, had no blue prints, as built, in order to form an opinion in opposition, reason for which a computerized blue print had to be made to be able to make the determinations presented in the present complaint.

b. The amount of $60,000.00 had to be collected in order to be able to make the structural study.

The study took a while because the apartments had to be entered in order to investigate the building and it was not until 1989 that the same was concluded.

25. The defendants also obtained the use permit in a fraudulent manner, since the same certifies having been obtained in accordance with the blue prints originally approved by the Regulations and Permit Administration.

JUDGMENTS ENTERED IN THE FEDERAL DISTRICT COURT OF PUERTO RICO.

26. In 1992, the Federal District Court for Puerto Rico entered a judgment for dismissal under Rule 9(b) of Federal Civil Procedure in case Tay Benet Soto et als. Vs. The Chase *Manhattan Bank, et* als, 791 F.Supp. 914, 917 (D.P.R. 1992), regarding Racketeering Influenced and Corrupt Organization, based on the Federal Court deciding that it had not been alleged the inclusion of the lefters'in which postal service was used with the specificity required by the first circuit, this even though the same were included for the record. The

judgment is not a judged matter, as stated in the case Tali Benet Soto et als. Vs. The Chase *Manhattan Bank et* als. 99-1375(JAF).

Not being the same res judicata, since the present action is of State level and under the intrajurisdictional jurisdiction, it does not merit full credit, it is not a collateral impediment, nor does it constitute judged matter, the same is not on the merits, since the same is entered based on a procedural problem with the use of the letters in the federal mail.

27. On March 30th , 2000, the Federal District Court of Puerto Rico entered a judgment refusing to intercede in the case *Tali Benet Soto et als Vs. The Chase Manhattan Bank et als.*, 99-1375(JAF), because according to the judgment, it had not been alleged with enough specificity the fraud committed to the court under Rule 9(b) of Federal Civil Procedure, as demanded by the first circuit.

28. The referred judgment for dismissal from the Federal District Court, case 99-1375(JAF), of March 30, 2000, does not constitute res judicata, under the interpretative jurisprudence of intrajurisdictional character, by it not being a jidgment on the merits, the present being a State level controversy, and only being adjudicated the lack of specificity in the allegations of fraud in the complaint, as determined and alleged by the federal court, very special requirements from the first circuit.

29. The referred judgment for dismissal from the Federal District Court, case 99-1375(JAF), determined that engineer Agapito Font was paid by the defendants through compensation forms unacceptable in the construction financing industry.

30. That the doctrine regarding specificity in the allegations in the jurisdiction of Puerto Rico, as well as in other federal jurisdictions, is totally different and more flexible than the one denounced by the Federal District Court of Puerto Rico. In *Carrasquillo v. Uppit & Simonpietri, Inc.*, **98 D.P.R. 659,**

662 (1970), and in *Garcia Lopez v. Mendez Garcia,* 102 D.P. R. 383, 386 (1974), was abandoned the qualification of solid, clear and convincing and uncontested proof.

31. Contrary to the judgment for dismissal from the Federal District Court, case 99-1375(JAF), supra, the plaintiff alleged fraud to the Federal Court, through he use of engineer Agapito Font's reports, nevertheless, a r6consideration was not filed before that forum, since it is well known that the same are sometimes resolved a year or more later, and the present ca~e requires immediate attention due to the hazardous condition of the building.

32. That at all times in the cases cited in the present complaint regarding the Condominio Segovia, has been involved the law firm of Fiddler, Gonzalez & Rodriguez.

33. In the judgment of January 31, 1986, case 79-7994, supra, the main center of the fraud are the reports of engineer Agapito Font.

34. Dr. Rafael Jiménez, structural engineer, contracted by the Board of Directors of the Condominio Segovia, made a study which was concluded in 1989, in which it is determined that the exists inherent danger and that the referred building may collapse. For which the building represents an inherent hazard to the persons living there.

35. That the present litigation represents a matter of public interest for which does not apply the doctrine of judged matter in any of its variants or collateral impediment.

36. That the present litigation is filed as a class action and under the doctrine based on the case of *De la Cruz v. Toro Sintes,* 112 D.P.R. 650(1982), wherein t he Supreme Court decides that because of security reasons a co-owner of a building may present a complaint without the majority of votes, when the common property of a Condominium is being affected.

PARTIES OF THE LITIGATION

37. The plaintiffs are the owners of two apartments

respectively in the building known as Condominio Segovia.

38. The Chase Manhattan Bank ("Chase"), is a created corporation and assumed all debts and responsibilities of the chase Manhattan Bank, N.A., Housing 16vestment, Corp., and Chemical Bank.

GENERAL ALLEGATIONS

39. Construction in Puerto Rico is vested on public interest.

40. Construction and the use of buildings in Puerto Rico are regulated by the state agency known as Regulations and Permit Administration.

41. No engineer may intervene in order to alter approved original blue prints for the construction of a building once they approved by the Regulations and Permit Administration (ARPE).

42. In order to alter a construction it is necessary to present blue prints once again for the approval or rejection of the changes.

43. The defendants illegally repaired the building known as Condominio Segovia, and they proceeded with the sale of the apartments.

44. The actions committed by the defendants were contrary to their regulations and to the contract of interim loans which required that the construction be made in accordance with the demands of the State, and in accordance with the permits granted for the construction.

45. The actions described in the present complaint demonstrate that the defendants exceeded themselves from the actions permitted to financing entities in the interim loans for construction.

46. The defendants controlled the repair of the building, paying directly to the contractors in open violation of the laws of the Commonwealth of Puerto Rico and of its interim loan contract.

47. The defendants directly sold close to 151 building

apartments.

48. The other corporations which took part in the scheme are do not exist at the time.

49. The defendants proceeded to repair the building fully aware that the concrete walls (hormigones) did not keep the required consistency demanded in the blue prints. For which the structure has an inherent danger for all those who live there.

50. Having concluded the supposed repairs, the defendants took in payment for 151 apartments the amount of $9,732,538.52, under the same fraudulent scheme pattern and in order to conceal the scheme.

51. The defendants secured the interim finance of the sale of the apartment, by including a penalty clause in the interim loan contract to the effect of paying by the developer the amount of $500.00 for each apartment financed by a bank other than the defendants.

52. In the judgment of January 31, 1986, case 79-7994, supra, the court determined the following:

a. That in January 1995, there was meeting with the defendants at the Housing Investment, Corp. offices, in which the defendants agreed and decided how the building was supposedly to be fixed.

b. Under that agreement the defendants allowed the iron rods of the shear walls to be cut, in order to be substituted for steel plates.

C. The Superior Court determined in its judgment that the deficiencies were repaired. (referring to all the repaired defects).

d. The Superior Court determined in its judgment that after the conclusion of the work, engineer Agapito Font certified that the repairs were correct.

53. At the time the judgment was entered it was impossible to determine the building's condition without performing the structural study.

54. The alleged certifications or reports in the State case 79-7994, supra, is the causal relation for the fraud for which a case of hidden defects was not proven inasmuch as the defendants countersigned and subscribed the false and fraudulent evidence produced by their engineer knowing that the same caused an act which tainted the process of justice.
55. The defendants did not follow the regulations known as Planning Regulation #7, known by law as Building Regulation, administered by the Regulations and Permit Administration (ARPE).
56. The building is weak for hurricanes and earthquakes and may also collapse due to the deficiency in the concrete walls (hormigones), in non compliance with the building codes.
57. The plaster is falling off because it was applied over a metal sheet which gives the appearance of being leveled. '
58. There is the existence of thousands of water filtrations and the contaminated water comes up the owner's bathrooms.
59. The elevator has a two feet (desaplomo).
60. The judgment entered by the Federal Court in case number 991375(JAF), makes the same determinations from the allegations of the complaint, dismissing the same because, as is believed by the court, time, place and content of the alleged fraud was not alleged. Very important and special requisite from the first circuit and rejected by the Supreme Court of Puerto Rico.

DAMAGES

61. The apartment of the plaintiff Carmen Caballero was purchased directly from the defendants and has been closed for the last seven years because the column rods exploded ejecting and breaking the plaster.
62. Plaintiff Carmen Caballero has paid the sum of $90,000.00 for the apartment plus the sum of $21,120 for maintenance. The plaintiff has sustained damages in the sum of $250,000.00

63. The buildings elevators are continuously out of order, making life impossible to plaintiff Tali Benet Soto, since the same is a (minusvalida) person whom has to move around in a wheelchair.
64. Tali Benet Soto, bought an apartment directly from the defendants and has paid approximately $79,200.00 and $20,000.00 in advance. The plaintiff has sustained damages in the sum of $500,000.00.
65. It is estimated that the damages to the property and total losses of all co-owners from Condominio Segovia, which total over three hundred apartments, adds up to the amount of fifty million dollars.
For which it is requested from this Honorable Court that it finds against the defendants for the amounts requested, as the complaint continues to be amended. That it be taken into consideration the fraud committed against the Superior Court which has allowed the damages to the plaintiffs to continue to escalate. In the same manner that they be ordered to make the arrangements for the cancellation of any mortgage with any expenses entailed therein.
The imposition of costs and attorneys fees is requested.

In addition, it is also requested that being the facts and circumstances the same for all those prejudiced, it is requested that the present be classified as a class action.

Respectfully submitted: May 3, 2000

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Supreme Court, U.S.
FILED
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No. 01-1497

In The

Supreme Court of the United States

CARMEN CABALLERO RIVERA,
TALÍ BENET SOTO,

Petitioners,

v.

THE CHASE MANHATTAN BANK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court and the court of appeals erred in recognizing the preclusive effect of *res judicata* of a prior, final, and unappealed decision by the district court in an action between the same parties and involving the same allegations and issues by not applying a public policy exception to the application of *res judicata* Petitioners contend exists under state law.

PARTIES

The parties are Plaintiffs-Petitioners Carmen Caballero-Rivera and Tali Benet-Soto ("Petitioners" or "Caballero and Benet") and Defendant-Respondent The Chase Manhattan Bank ("Respondent" or "Chase").

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the undersigned attorney of record for Chase certifies that the following reflects any publicly held corporate parents, and listing of any publicly held company that owns 10% or more of Chase's stock:

J.P. Morgan Chase & Co.

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Torrens González v. *Fireman's Fund Insurance Co.*, 385 F. Supp. 140 (1974) 17

OPINIONS BELOW

Caballero-Rivera, et al. v. *Chase Manhattan Bank,* et al., No. 01-1985 (1st Cir. January 10, 2002) (Per Curiam), 276 F.3d 85 (1st Cir. 2002).

Caballero-Rivera, et al. v. *Chase Manhattan Bank, et al.,* No. 00-1858 (D.P.R. May 18, 2001) (Cerezo, J.)

Caballero-Rivera, et al. v. *Chase Manhattan Bank, et al.,* No. 99-1375 (D.P.R. March 30, 2000) (Fusté, J.)

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1332(a)(1) (diversity jurisdiction) and § 1441(a) (diversity actions removable) by virtue of the complete diversity of citizenship between Chase and Caballero and Benet, the amount in controversy exceeding $75,000, exclusive of interest and costs. The court of appeals had appellate jurisdiction under 28 U.S.C. § 1291 (appeals of final decisions of district courts), and the Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS CITED

28 U.S.C. § 1332(a)(1)

28 U.S.C. § 1441(a)

28 U.S.C. § 1291

28 U.S.C. § 1254(1)

31 L.P.R.A. § 1851

Fed.R.Civ.P. 60(b)

Art. 1483, Puerto Rico Civil Code, 31 L.P.R.A. § 4124

Fed.R.Civ.P. 9(b)

Fed. R. Evid. 201

Rule 10 of the Rules of the Supreme Court of the U.S.

Rule 29.6 of the Rules of the Supreme Court of the U.S.

STATEMENT OF THE CASE

1. Nature of the Case.

Petitioners Caballero and Benet filed their complaint against Chase and against Housing Investment Corporation ("HIC")[1] in the Superior Court of Puerto Rico (San Juan) (Civil KAC00-2270 (902)). Complaint, Appendix to Petition for a Writ of Certiorari ("App."), at 21A-31A.

A summary of the allegations made to the Superior Court can be obtained from an Opinion and Order by U.S. District Judge Fusté's Order (App. 10A-11A) because the Superior Court complaint is almost identical to the complaint filed by the same Petitioners in Federal Court the year before, which was dismissed by Judge Fusté. Basically, Caballero and Benet accused Chase and its lawyers of committing a fraud on the Superior Court in an

[1] HIC, a subsidiary of Chase's corporate predecessor, was involved in construction financing in Puerto Rico during the 1970's. HIC does not have corporate existence and was not part of the proceedings below. Notice of Removal at 2, n.2, DE 1.

action that Petitioners and others filed in 1979,[2] and which ended in a judgment dismissing that action long ago.

Petitioners claim that their 1979 Superior Court complaint alleging construction defects in the Segovia Condominium was dismissed because they could not controvert false information allegedly submitted by Chase and its lawyers to the effect that the alleged defects in the condominium structure had been repaired according to specifications and government regulations.[3]

---

[2] *Sonia Ortiz, by herself and on behalf of Condominio Segovia's apartment owners v. The Chase Manhattan Bank, N.A. et al.*, Civil Núm. 79-7994 (806) (the "1979 Superior Court action".)

[3] Although not essential for disposition of this petition, Chase wants to state for the record that it vehemently denies these allegations. Also, Petitioners misrepresent the basis of the dismissal of the 1979 Superior Court complaint. The Superior Court did not dismiss the complaint because the alleged construction defects had been repaired. It dismissed the action against Chase because Chase only acted as a typical lender. U.S. District Judge Cerezo, who examined the voluminous record of the 1979 Superior Court case in the RICO action Petitioners filed in 1990, described the real basis of the dismissal of the 1979 Supreme Court action as follows:

> The Superior Court of San Juan expressly found, based upon the admissible evidence, that neither Chase nor Housing acted or participated in any way in the repairs of the defects of the condominium. This Court further found that Chase's and Housing's participation in relation to the project was limited to that ordinarily carried out by financial entities, that they exercised the typical and traditional functions of generating interim financing for the construction of the project. *Benet-Soto* v. *The Chase Manhattan Bank, N.A.*, 791 F.Supp. 914, 917 (D.P.R. 1992).

2. Course of the Proceedings.

On July 11, 2000, Chase removed the Superior Court action to the U.S. District Court. In moving to remand on July 17, 2000, Petitioners acknowledged that the Superior Court complaint was essentially the same complaint they filed the year before in federal court before Judge Fusté (Civil No. 99-1375 (JAF)). Motion to Remand, DE 2, ¶ 2, at 1.[4] Judge Fusté dismissed this action. Opinion and Judgment, App. at 9A-20A. Petitioners did not seek reconsideration of that dismissal nor appealed it to the Court of Appeals for the First Circuit.

Petitioners Caballero and Benet argued that removal was improper because the district court "cannot entertain the captioned case because it was already dismissed by way of Rule 9(b) of Federal Procedure and under diversity of citizenship, case number 99-1375 (JAF)." Motion to remand, DE 2, ¶ 2, at 1. They later reiterated their position as follows: "[t]his court lacks jurisdiction to entertain this case under this removal proceeding because of a judgment issued by this Court in *Carmen Caballero* v. *The*

The Superior Court after years of intensive litigation and ample discovery, based on Puerto Rico Supreme Court's seminal decision in *Chase Manhattan* v. *Emanuelli Bauzá*, 111 D.P.R. 708 (1981), 11 Official Translations of the Opinions of the P.R. Supreme Court ("Official Translations") 893, which held that absent extraordinary circumstances, a financial institution is not liable as a matter of law for construction defects *unless* it exceeds its traditional financial role.

[4] References to pleadings and motions in the record *not* in the Appendix will be made to their docket entry number ("D.E. ___", *e.g.* D.E. 2).

Chase Manhattan Bank, et al., (JAF), case number 99-1375." Opposition to motion to dismiss, DE 11, ¶ 2, at 2. Petitioners' position boils down to the proposition that Judge Fusté's judgment bars a lawsuit in federal court but not in Puerto Rico Superior Court.

On September 29, 2000, Chase filed its opposition to the motion to remand (DE 9), and also moved to dismiss on grounds that this action was barred by Judge Fusté's judgment under principles of *res judicata*. On October 6, 2000, Caballero and Benet filed their opposition. They argued that neither Judge Fusté's judgment in Civil 99-1375 (JAF), nor the previous judgment of dismissal by Judge Cerezo sitting in *Benet-Soto* v. *The Chase Manhattan Bank N.A.*, 791 F.Supp. 914 (D.P.R. 1992), barred their identical lawsuit in the Superior Court.

Petitioners argued that Judge Fusté's judgment in Civil No. 99-1375 (JAF) was not *res judicata* to their Superior Court action because it presumably was not on the merits. Petitioners articulated their position as follows: "Apparently, the Defendants do not have the skills necessary to illustrate this court when and how a dismissal under Rule 9(b) is a dismissal on the merits. Especially when there is a state cause of action involve [sic]." Opposition to motion to dismiss, DE 11, ¶ 8, at 4. Petitioners, Caballero and Benet, urged the district court to disregard the bar of *res judicata* based on the argument that the Superior Court would not give Judge Fusté's judgment *res judicata* effect on public policy grounds under Puerto Rico law. *Id.*, ¶ 10, at 5. Petitioners also asked the district court to disregard the previous judgment of the district court in *Benet-Soto* v. *The Chase Manhattan Bank N.A.*, 791

F.Supp. 914 (D.P.R. 1992), because "[t]he court by dismissing the RICO Act action, decided not to get involved in the cause of action of structural defects." *Id.*, ¶ 5, at 3.

3. Disposition by the District Court.

The district court granted Chase's motion to dismiss holding that the complaint was barred by Judge Fusté's previous dismissal and entered judgment. App. 5A-8A. The district court rejected Petitioners' arguments, noting that "Judge Fusté did address the merits of the allegations and found that they did not sufficiently demonstrate a cause of action for fraud." *Id.*, App. 8A. Agreeing with Judge Fusté's assessment, the district court noted that Caballero and Benet had "audaciously . . . attempt[ed] to obtain some more bite at the proverbial apple." App. 7A. The district court concluded that "this is one more episode in a long line of vexatious suits", and dismissed the complaint. Judge Cerezo's Order at App. 8A.

4. Disposition by the Court of Appeals.

On January 10, 2002, the Court of Appeals for the First Circuit affirmed the district court's *res judicata* ruling. It concluded that all three factors for the applicability of the doctrine of *res judicata* – a final judgment on the merits and sufficient identical causes of action and parties – were present and, further, that the prior district court decision (the one considered *res judicata*) did not suffer from any procedural defect. It also noted that Petitioners'

inability "to satisfy the pleading requirements after eight years of litigation" buttressed its conclusions. App. at 4A.

REASONS FOR DENYING THE WRIT

1. Introduction

There are no compelling reasons for review of the decision of the court of appeals. The matters for which review is sought do not fall under any of the categories set forth in Rule 10 of the Rules of the Supreme Court of the United States and, furthermore, there is no error in the decisions of either of the courts below. This action presents a simple and straightforward application of the doctrine of *res judicata*. If there is anything noteworthy in it, it is the persistent abuse of process by Petitioners, which the courts below refused to sanction.

The essence of this action is as follows: Petitioners filed an action in U.S. District Court invoking a fraud exception to *res judicata* in order to request the district court to set aside a judgment entered in 1986 by the state court dismissing Petitioners' construction defects action against, *inter alia*, Respondent Chase. The district court recognized the applicability of the exception, but proceeded to dismiss the action on the merits. Instead of seeking reconsideration or appealing the dismissal, Petitioners re-filed the same action in state court, from whence it was removed to the U.S. District Court on diversity grounds. Because the removed state action and the previous federal action were identical in all essential respects, a fact admitted by Petitioners themselves, the

district court properly dismissed the case on grounds of *res judicata*.

Petitioners appeal this dismissal claiming yet another exception to *res judicata*. They also argued that *res judicata* barred the district court from exercising jurisdiction over the removed action, but that this bar did not apply to the state court. Basically, their argument is that the judgments of a federal court are binding upon other federal courts, but not upon state courts (or a federal court sitting in diversity).

2. Federal, not Puerto Rico, Law Determines *Res Judicata* in this Action.

Petitioners' main argument is that *res judicata* has no preclusive effect in this action based on the alleged applicability of an exception under state law. According to Petitioners, the district court should have looked to state law in order to decide whether a *federal* judgment is *res judicata*. They further claim that the relevant state law, i.e. Puerto Rico law, provides a "public policy" exception to the application of *res judicata*, and allege that such an exception comes into play whenever there is an effect on "the family nucleus" or when "the safety of what it is constructed" is concerned. Caballero and Benet's Petition for a Writ of Certiorari (the "Petition"), at 7.[5]

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[5] Petitioners also contend that Puerto Rico's statutory right to a homestead justifies an exception to *res judicata*. 31 L.P.R.A. § 1851. However, they misstate the scope of this right. Petition, at 16. This provision only protects the sum of $1,500 from foreclosure by creditors. Quite simply, if the possibility of losing

The basis for Petitioners' claim that state law should have been used to determine the preclusive effect of *res judicata* is the allegation that "[t]he U.S. Supreme Court already determined that federal res judicata principles only apply on non-diversity cases." Petition, at 7. In support of this proposition, they cite *Heiser* v. *Woodruff*, 327 U.S. 726 (1946).

Woodruff, holds nothing of the sort. It merely reaffirms that "[i]t has been held in non-diversity cases, since *Erie R. Co.* v. *Tompkins*, that the federal courts will apply their own rule of res judicata," 327 U.S. at 733. *Woodruff* does not limit that rule to non-diversity cases. The law is actually otherwise. Even though state law governs the adjudication of substantive aspects of state law claims in diversity actions, "federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity." *Semtek International Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001), Case No. 99-1151, 2001 U.S. LEXIS 1951, at *21 (Feb. 27, 2001). In other words, the question whether the complaint in this case is barred by Judge Fusté's dismissal of Petitioners' prior action must be determined by federal, not Puerto Rico, law.

Petitioners' reliance on *Woodruff* is ironic, given that *Woodruff* holds squarely against Petitioners. In *Woodruff*, an attempt was made to relitigate a claim that a previous judgment had been procured by fraud. The Supreme Court held, however, that the relitigation of the claim was

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one's home in a foreclosure action were an exception to *res judicata*, mortgage foreclosures and evictions would always be subject to relitigation.

barred by *res judicata* because the allegations of fraud had already been dismissed in a previous action because they "had not [been] sustained . . . by any tender of evidence or other proof." *Woodruff*, 327 U.S. at 725.

The Court held that the previous dismissal "was a final judgment on the issues thus raised, binding on the parties to the proceeding. It is not any the less so, as the Court of Appeals thought, because the moving parties failed to support their allegations by evidence." *Id.* The Court later added, in terms fully applicable to this action, that "[n]or can an attack be sustained on a judgment allegedly procured by fraudulent representations of the plaintiff, when the charge of fraud has been rejected in previous litigations by the parties to the suit in which the judgment was rendered, or their representatives." *Id.* at 736.

Woodruff disposes of at least a couple of Petitioners' arguments. First, it rebuts Petitioners' argument that the judgment by Judge Fusté should not be recognized as *res judicata* because of the very allegations of fraud that Judge Fusté dismissed by means of summary judgment. Second, it directly contradicts Petitioners' argument that Judge Fusté's judgment is not *res judicata* because it was based on a finding of lack of sufficient evidence or proof for the alleged fraud, or because no trial was held on the issues, as Petitioners mistakenly believe to be required for *res judicata*. *See* Petition, p. 6.

From another perspective, Petitioners' arguments for the application of Puerto Rico *res judicata* principles are further invalidated because the issues addressed in Judge Fusté's decision were federal ones: the applicability and

interpretation of Fed. R. Civ. P. 60(b). All the more reason, then, for federal *res judicata* principles to be applied, regardless of whether this was a diversity case. "[F]ederal reference to state law will not obtain, of course, in situations in which state law is incompatible with federal interests. If for example, state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders, federal courts' interest in the integrity of their own processes might justify a contrary federal rule." *Semtek, supra,* 2001 U.S. LEXIS 1951 at *22-*23. Clearly, the interpretation and implementation of the Federal Rules of Civil Procedure and the policies contained in them is a matter to be decided according to federal, not Puerto Rico law.

Now, in federal common law, no public interest exception to *res judicata* exists. This was categorically established in *Federated Department Stores, Inc.* v. *Moitie,* 452 U.S. 394 (1981):

> "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." The Court of Appeals' reliance on "public policy" is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." We have

> stressed that "[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts." *Moitie*, 452 U.S. at 401. (Citations omitted.)

Quite clearly, this lack of a public interest or equitable exception to *res judicata* in the federal jurisdiction is fatal to Petitioners' claim that their action is exempt from *res judicata* because of some vague and overbroad alleged public interest.

3. Puerto Rico Law Does Not Provide an Exception to *Res Judicata* in this Action

In any case, even if Puerto Rico's doctrine of *res judicata* were to apply, it would not have prevented dismissal. Puerto Rico's judicially created "public interest" exception is not as far-reaching as Petitioners present it. It is rather a narrow exception that should be limited to those facts where the Puerto Rico Supreme Court has expressly held it to apply.

According to Petitioners, two different public interests are involved in this case, both of which justify exceptions to *res judicata*. They contend, first, that the "family nucleus is affected negatively," and second, that this action deals with "the safety of what it is constructed." Petition, pp. 6-7. These categories, however, are both unworkable as exceptions to *res judicata* and inapposite with respect to the issues involved in this action. Furthermore, Puerto Rico's Supreme Court has never recognized such broad exceptions to *res judicata* as actions

"affect[ing] the family nucleus" or "the safety of what it is constructed," nor would it be likely to do so. Such sweeping exceptions would wreak havoc upon the legal order of Puerto Rico.[6] They would result in endless relitigation of numerous controversies and would be contrary to the Puerto Rico Supreme Court's declaration that the rule of *res judicata* "has few exceptions[,] for application to very limited and particular circumstances." *Ramos González* v. *Félix Medina*, 121 D.P.R. 312, 340 (1988) (Official Translation).

Actually, the cases that Petitioners cite for the proposition that those two broad categories represent public interests that justify exceptions to the doctrine of *res judicata* hold nothing of the sort. First, *Ramos González*, which is represented by Petitioners as holding "that the family nucleus and how it is affected negatively goes beyond and above the defense of res judicata and collateral estoppel" (Petition, at p. 10) does not even deal with family issues. In reality, it deals with Puerto Rico's interest in the integrity of its justice system, and with grave accusations of improper acts by three Puerto Rico court marshals.

The facts in *Ramos González* were as follows. Ramos González's house was sold in a mortgage foreclosure proceeding and then resold to one of the co-defendants, a Puerto Rico marshal, who, accompanied by two fellow marshals,

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[6] For example, according to Petitioners' interpretation, *res judicata* would never apply in actions involving family law. *See* Petition, p. 11. This is such an overreaching proposition that no court of law would ever uphold it.

> went to the house of [coplaintiff] Ramos González and his wife holding a photocopy of the judicial sales minute. It is alleged that the marshals altered the same without authorization entering the phrase 'order for eviction' on the back of the sheet. . . . [A]fter a discussion as to the ownership of the house where [plaintiffs] lived with their fourteen children and over the existing crops, the said marshals inflicted a bullet wound on Ramos González, and beat his wife and a minor son. They also destroyed the roof of the dwelling. Then they arrested the spouses, took them to the Caguas Regional Hospital and abandoned them there. *Ramos González*, 121 D.P.R. at 317 (Official Translation).

With these facts in mind, the Puerto Rico Supreme Court refused to hold that a dismissal by the U.S. District Court of a civil rights case for lack of prosecution should preclude a *concurrent tort* action in Puerto Rico Superior Court based on the same events. It held that:

> [T]he public interest in keeping our system of justice free of any appearance of partiality, even if unfounded, surpasses the interest in keeping the finality and efficacy of judgments from other jurisdictions, specially if we consider that the judgment entered in this case was a dismissal for lack of prosecution and not a judgment issued after a plenary trial and that, under the present state of law at the local federal forum, a judgment of that nature no longer operates as an adjudication on the merits. *Id.*, 121 D.P.R. at 341-342 (Official Translation).

On the other hand, *Geigel* v. *Mariani*, 85 P.R.R. 43, 85 D.P.R. 46 (1962), cited by Petitioners to support the proposition that construction safety is a public interest that

justifies an exception to *res judicata*, is also inapplicable. That case interprets Art. 1483 of the Puerto Rico Civil Code, 31 L.P.R.A. § 4124, which establishes a 10-year statute of limitations for claims of construction defects against the contractor and the architect of a defective structure. *Geigel* does not deal with *res judicata* at all but rather with the correct interpretation of the term "construction vices" as used in Art. 1483. The Puerto Rico Supreme Court did state in *Geigel* that there was a public interest in construction safety, but it was offered as an explanation of the legal rule that contractors and architects are not discharged of the responsibility imposed by Art. 1483 even if the owner of the building is aware of the defects in the proposed construction.

The Puerto Rico Supreme Court, moreover, has never recognized a *res judicata* exception for claims alleging construction defects. In fact, when the Puerto Rico Supreme Court has faced the issue of *res judicata* in construction defects cases, it has not even hinted that a public interest exception may apply. *See Feliciano Ruiz* v. *Alfonso Development Corp.*, 96 P.R.R. 105, 96 D.P.R. 108 (1968), *infra*, and *González* v. *Agostini*, 79 P.R.R. 481, 79 D.P.R. 510, 513-514 (1956). In *Agostini*, for example, an action for hidden construction defects was held not barred by *res judicata* owing to a prior decision, because the two causes of action concerned originated from different contracts, not because of "construction safety." The Court never hinted, even in passing, the possibility of a public interest exception to *res judicata* for claims about construction defects.

The inapplicability of any Puerto Rico exception to *res judicata* is further made clear once it is considered that

none of the decisions cited by Petitioners in which the Puerto Rico Supreme Court held that "as a matter of public policy, the doctrine of res judicata should not be applied if it would defeat the ends of justice" is remotely analogous to the present one. *See* Petition, p. 11.

First, in *Figueroa* v. *Municipality of San Juan*, 98 P.R.R. 523, 98 D.P.R. 534, 559 (1970), *res judicata* was held not to apply because the issue before the court in the second action was based on events that took place after the adjudication of the first one.

Second, in *Feliciano Ruiz, supra,* two parties were dismissed because of failure to state a claim against them. Later, when the dissolution of one of the corporate defendants was discovered, plaintiff sought leave to amend the complaint in order to bring back to the action the parties previously dismissed. The Supreme Court held that *res judicata* did not bar the re-inclusion of those parties because there was no identity of cause and the parties were not being included in the same capacity as before[7] since the new claims against them were based on the derivative responsibility of stockholders of a dissolved corporation. It should also be noted that this case concerned both claims for construction defects and *res judicata,* but the Puerto Rico Supreme Court never considered that a public interest exception to *res judicata* could exist.

Third, *Pérez* v. *Bauzá*, 83 P.R.R. 213, 83 D.P.R. 220 (1961), was a paternity suit that was dismissed because of

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[7] *See, e.g., Futura Development Corp.* v. *Centex Corp.*, 761 F.2d 33 (1st Cir. 1985), for an explanation of the requirements of Puerto Rico's doctrine of *res judicata*.

lack of prosecution. The Puerto Rico Supreme Court created an exception to *res judicata* in that instance because it felt a minor child should not be penalized by "the overreaching or improper conduct of his legal representative" against which the minor was helpless to protect himself. *Id.*, 83 P.R.R. at 218. The Supreme Court stated that paternity suits were endowed with great public interest and constitutional implications regarding the dignity of the minor. It noted that Puerto Rico's Constitution proclaims that the dignity of a human being is inviolable. *Id.*

Fourth, in *Torrens González* v. *Fireman's Fund Insurance Co.*, 385 F. Supp. 140 (1974), the effect of *res judicata* was denied to a Puerto Rico court judgment dismissing a case on grounds of lack of prosecution. Although the district court stated that this denial of *res judicata* was based on *Bauzá*'s holding that the doctrine of *res judicata* "is not to be applied if in so doing the ends of justice would be defeated, especially if reasons of public policy are involved," it emphasized that "[a]dditionally, it must be seen that the Court's dismissal for lack of prosecution, as the record reflects, is being questioned at present, in the local proceedings. . . . Therefore, in our opinion, *no final judgment is present.*" *Id.* at 146-147 (emphasis added).

Fifth, *Rodríguez* v. *Baldrich*, 628 F.2d 691 (1st Cir. 1980), is inapplicable to this action because it addressed "the *res judicata* implications of a prior *Puerto Rican Superior Court* judgment". 628 F.2d at 693 (emphasis added). This is distinguishable from the present action where the *res judicata* implications involved are those of a prior *federal court* judgment. The First Circuit did not determine in that action, as alleged by Petitioners, "that under diversity of citizenship the Court will look into the res

judicata doctrine under Puerto Rico law." Petition, p. 11. What the First Circuit court actually noted was that the weight of authority held that state (or "local law") determines the *res judicata* implications of a prior state judgment. *Baldrich*, 628 F.2d at 693.

In fact, the court in *Baldrich* found unconvincing an argument similar to that offered by Petitioners. As in this instance, in *Baldrich* the plaintiffs contended that *res judicata* should not apply "because a separate line of Puerto Rican cases states that, as a matter of public policy, *res judicata* should not be applied if it would defeat the ends of justice". *Id.* A superficial analogy was made to *Pérez* v. *Bauzá*, *supra*, because the rights of a minor were involved. The First Circuit noted the analogy, but stated that "we are by no means convinced that in this case the Puerto Rican courts would decline to invoke *res judicata*, just because a minor is involved and the defendant has not defended a suit on the merits." *Baldrich*, 628 F.2d at 693. It noted that "in *Pérez*, the court also emphasized the significant public interest that filiation actions have under Puerto Rican law. This case lacks that feature, and as such is more of a private dispute." *Id.* at 693-694, n. 4 (citation omitted).

From another perspective, even if such broad categories as "family nucleus" and "construction safety" were to be considered public interests that justify an exception to *res judicata*, Petitioners have failed to show how they are applicable or relevant to Judge Fusté's decision. Apart from general and conclusory allegations, Petitioners have always failed to discuss and specify which public interest would be promoted by denying preclusive effect to Judge Fusté's summary dismissal of the action. The issue before

Judge Fusté dealt neither with the family nucleus nor with construction safety, and Petitioners have referred to no other "public interest."

Moreover, Puerto Rico law does not truly have an exception to *res judicata* based on "public interest" *per se*. The true formulation of the exception established by the Puerto Rico Supreme Court is that "as a matter of public policy, *res judicata* should not be applied *if it would defeat the ends of justice.*" *Baldrich, supra,* 628 F.2d at 693 (emphasis added); *see* the cases cited therein. However, it is quite impossible to envision how the ends of justice would be defeated by giving Judge Fusté's judgment the force of *res judicata*. Petitioners have already had the benefit of having their claims heard by various courts. They have litigated this matter during 22 years, and their claims have been dismissed in six separate instances, both in federal court and in Puerto Rico state court. *See* Judge Fusté's Opinion and Order, App. at 11A-12A, which identifies at least four separate actions, all ending in dismissal (a July 5, 1990 dismissal by the Puerto Rico Superior Court is missing): the present one is the sixth. In this context, disallowing Judge Cerezo's and Judge Fusté's rulings would be to permit the continuance of an enduring vexatious conduct by Petitioners.

In precise terms, the issues before Judge Fusté were (1) whether under Fed.R.Civ.P. 60(b) the U.S. District Court could entertain an action to set aside a judgment of the Puerto Rico Superior Court because of a previously unlitigated claim of fraud upon the court, and (2) whether in effect to set aside the previous judgment. Essentially, the issue facing Judge Fusté was whether an exception to *res judicata* should apply with respect to a

prior Puerto Rico Superior Court judgment. Judge Fusté held that the exception applied, but then he entertained Petitioners' claim of fraud and found it lacking evidentiary support. Since no evidence of the alleged fraud had been proffered, the judgment of the Superior Court was left untouched. Petitioners Caballero and Benet, nevertheless, now wish to find a *res judicata* exception to a decision that was rendered on the basis of a *res judicata* exception to an even earlier judgment.

Caballero and Benet, in fact, have offered no reasons – whether based on a public interest or on another exception – why Judge Fusté's decision should not be considered *res judicata*. A close examination of Petitioners' position shows that they are ultimately questioning the correctness not of Judge Cerezo's ruling, but of Judge Fusté's. They contend somewhat confusedly that the allegations of fraud that Judge Fusté determined to be without merit justify denying Judge Fusté's decision itself the force of *res judicata*. *See* Petition, at 12-13. To that end, they misrepresent Judge Fusté's findings, claiming that he "acknowledged" that "[r]espondents left a building in ruins and with the possibility of collapsing and committed a fraud upon the First Instance, Superior Court of Puerto Rico", and that he further took judicial notice of the possibility of the building's collapse. Petition, p. 12.

Both these allegations are patently incorrect. First, Judge Fusté decided that Petitioners' allegations of fraud failed to meet the heightened pleading standards of Fed.R.Civ.P. 9 (b) and, furthermore, that the proffered evidence of fraud was insufficient. Judge Fusté's Opinion and Order, App. at 17A-20A. The court found, for example, that Petitioners' key piece of evidence, "[a] study

conducted four years after the lawsuit in which it is offered as proof of fraud is not a reliable means of supporting Plaintiffs' claims." App. at 19A. Second, as to the alleged possibility of the buildings' collapse, this simply is not the sort of fact about which a court may take judicial notice, Fed. R. Evid. 201 and in truth, the court only took notice of the fact that *Petitioners' study* claimed "that the building was in a horrendous condition and could collapse." App. at 18A-19A. Such notice, however, is a mere acknowledgment of the content of Petitioners' allegations, not of any fact about the building itself.

Ultimately, Petitioners' position, rather than invoking an exception to *res judicata*, is an attack on the correctness of Judge Fusté's decision, an attack that should have been addressed in an appeal. Petitioners, however, voluntarily chose to forego that appeal because they considered it would "take too long," as they themselves admitted to the court. *See* Judge Cerezo's Order, App. at 7A-8A, and ¶31 of appellants' Superior Court Complaint, App. at 26A. Furthermore, under both federal and Puerto Rico law, a final and unappealable judgment must be given the effect of *res judicata* regardless of whether it is correct or not. *Moitie*, 452 U.S. at 398. *Ramos González*, 121 D.P.R. at 340 (a final judgment should not be set aside because it appears erroneous, since this "could damage the due process of law afforded to the party favored by the previous judgment").

4. There is no Proper Issue of Abstention in this Action.

According to Petitioners, the U.S. District Court or Judge Cerezo "should have abstained to exercise its jurisdiction." Petition, p. 19. They claim that abstention should have followed upon the doctrine set forth in *Colorado River Water Conservation Dist.* v. *United States,* 424 U.S. 800 (1976). This argument, however, is completely inapplicable to the present action, which was not a federal action concurrent with a state court proceeding, but an action removed to federal court from state court. As a result, *Colorado River* abstention is of no relevance here. Furthermore, the issue of abstention was never argued by Petitioners before the District Court. It was first raised by Petitioners in their brief to the First Circuit Court of Appeals, without any serious effort to develop the argumentation; it must therefore be deemed waived.

CONCLUSION

There is no reason why the judgments of the U.S. District Court and the First Circuit Court of Appeals in this action should be reviewed by the U.S. Supreme Court. The dismissal of Petitioners' complaint was the result of a straightforward and correct application of the doctrine of *res judicata,* a dismissal that would be upheld by either Puerto Rico or federal common law. The exceptions alleged by Petitioners to deny a previous U.S. District Court judgment the force of *res judicata* simply do not exist. This action is nothing more than an attempt by Petitioners to evade the effects of a judgment by the U.S.

District Court that they voluntarily chose not to appeal. It is yet another vexatious attempt to continue relitigating claims that have been repeatedly dismissed by the U.S. and Puerto Rico courts for a period of over more than two decades. The Court should therefore deny Petitioners' writ of certiorari.

RESPECTFULLY SUBMITTED, at San Juan, Puerto Rico, this 13th day of May, 2002.

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